JUDICIAL REVIEW OF LEGISLATION IN CANADA

I. Introduction

NOT many years ago it was asserted that constitutional writers in the United States, although prone to compare American institutions with those of other nations, were "strangely unconscious" of the fact that on the border of their own country there was another great federation, similar in many respects to their own.[1] Within recent years many causes have combined to aid in the discovery of Canada and Canadian institutions, but it nevertheless remains true that most citizens of the United States are still entirely unfamiliar with the political affairs of our nearest neighbor. The same situation prevails with regard to the other self-governing dominions, — all of which have governments exhibiting remarkable comparisons and contrasts with the American political system.

There is always danger of misrepresentation and error in any effort to comment upon a government without a first-hand knowledge of the operation of political affairs. An appreciation of the customs, conventions, and those rather indefinite and vague understandings which play such an important part in the management of governments is indispensable to a thorough comprehension of any political organization. Because of this difficulty much of so-called comparative government degenerates into a formal constitutionalism or legalism which comes far from representing the real truth relative to foreign governments. At the risk of some such errors and misrepresentations this article aims to examine the practice of judicial review of legislation in Canada and to note comparisons between the application of judicial control there and in the United States.[2] Constitutional jurisprudence borders upon the domains of history, politics, and economics and is concerned with social and political theories as well as with maxims of the law. It is a subject of equal interest to students of government and to lawyers and judges.

Divergent Points of View Relative to Judicial Review in Canada. In any comparison of the constitutional basis of the federal systems

[1] Lefroy, Legislative Power in Canada, Introduction, xliii.

[2] For a survey of the history of judicial review in the United States, consult volume by the writer on the American Doctrine of Judicial Supremacy.

of Canada and the United States a notable divergence of opinion among commentators is at once apparent. No less an authority than Professor Dicey avers that so far as its federal characteristics are concerned the Constitution of the Dominion must be regarded as a copy of the Constitution of the United States.[3] A Canadian publicist is likewise responsible for the statement that the constitutional relation established between the judiciary and the other branches in the United States has its counterpart in the Dominion, where the judiciary exercise an analogous power in their interpretation of the British North America Act.[4] Thus it is maintained that the extraordinary function allotted to the judiciary in the United States, — the function of defining and declaring the fundamental law, — is practically duplicated in the Canadian government. Frequent comments by members of the bar in the United States as well as newspaper reports call attention to the fact that judicial control in this country corresponds in all essential principles to a similar authority wielded by the courts of the Dominion.

On the other hand Lefroy, a distinguished authority on Canadian public law, denies that the Canadian Constitution can in any sense be considered a copy of the Constitution of the United States.[5] This author in his volume on the "Law of Legislative Power in Canada" gives special emphasis to the contention that judicial control over legislation, — the peculiar feature of the American federation, — can in no specific sense be held to be applicable to the Canadian government. Accordingly it is asserted that the framers of the British North America Act adhered as closely as possible to the British system in preference to that of the United States. The sanction of Supreme Court justices and of the Judicial Committee of the Privy Council has been placed upon this opinion.

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[3] DICEY, LAW OF THE CONSTITUTION, 156. See LEFROY, LEGISLATIVE POWER IN CANADA, Introduction, for a criticism of this statement and a defense of the view that the Constitution of Canada is similar in principle to that of the United Kingdom. In a note to the third edition of the LAW OF THE CONSTITUTION, Dicey styles this claim on the part of the Canadians as "official mendacity," — a term which on account of the vigorous resentment encountered in the Dominion is changed in subsequent editions to a "diplomatic inaccuracy." *Cf.* DICEY, LAW OF THE CONSTITUTION, 3 ed., 155, and 6 ed., 161.

[4] LEACOCK, ELEMENTS OF POLITICAL SCIENCE, 214.

[5] LEFROY, LEGISLATIVE POWER IN CANADA, xliv.

So strong is the conviction relative thereto that in a more recent volume the same author concludes a section discussing comparisons and contrasts between the federal systems of Canada and the United States with this comment: "Little was to be gained except by way of warning from the Constitution of the United States." [6]

The differences between the two systems are dwelt upon at length in the opinions rendered by Canadian Supreme Court justices. Some typical extracts are worthy of quotation in full. "Several decisions of the courts of the United States have been cited to us," observes Justice Gwynne, "but these being based upon the constitution of the several states of the Union and the Federal Government, and upon the constitutional relation which they bear to each other, can afford little assistance upon matters arising under our constitution, which though of a federal nature, is totally different from that of the United States." [7] Similarly Justice Taschereau maintains:

"The relative positions of the Parliament of the Dominion of Canada, and the legislatures of the various provinces, are so entirely different from those of Congress and the legislatures of the several states, that all decisions from the United States Supreme Court, though certainly always entitled to great consideration, must be referred to here with great caution." [8]

The mature conclusion of a member of the Privy Council relative to the matter is summed up as follows:

"I have read a little American Law and constitutional law, and I can only say this: My impression arising from the study of it has always been that there is very little similarity, still less identity, between the American Constitution, — and the Act of 1867." [9]

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[6] LEFROY, CANADA'S FEDERAL SYSTEM, 742.

[7] *In re* Niagara Election Case, 29 Com. Pl. 261, 274 (1878).

[8] The Citizens' and the Queen's Ins. Co. *v.* Parsons, 4 Sup. Ct. Rep. 215, 299 (1880).

[9] Quoted from Lord Watson in LEFROY, CANADA'S FEDERAL SYSTEM, 745; *cf.* Valin *v.* Langlois, 3 Sup. Ct. Rep., 1, 55 (1879), wherein it is held that, "If there be, in many respects, an analogy between the two countries, there is certainly none whatever in the mode adopted for the distribution of the legislative power;" and *In Re* Niagara Election Case, Justice Gwynne, after a comparison of the two federations, maintains: "It is obvious that a confederation so constituted bears no resemblance whatever to the confederation of states of the American Union. Decisions therefore of the United States courts upon questions arising out of the relation of the several states of the Union to each other, and to the federal government, can be of little assistance to us upon the question before us." 29 Com. Pl. 261, 275 (1878).

This view also has its exponents in the United States. In a recent article relative to Ontario courts and procedure the writer notes that since Canada has no written constitution her legislatures necessarily are supreme and that "Canadian courts like those of England, have no power to declare statutes unconstitutional." [10] Evidently there is a marked lack of agreement as to the relation of courts to legislation under the Canadian Constitution. The relative merit of these points of view can best be judged in the light of a survey of the practice of Canadian courts in reviewing legislation.

Salient Features of Canadian Federal System. Before proceeding to a discussion of the practice of judicial review in Canada it is necessary to point out some cardinal points of difference between the Canadian and American systems. Those features in which the framers of the Canadian federation have followed a different plan of procedure from the United States will be noted here, leaving for later discussion the effect of these features upon judicial review. First among these is the proposition that all legislative powers are distributed between the federal parliament on the one hand and the provincial legislatures on the other. The British North America Act does not contain a series of limitations on legislative power such as is ordinarily comprised within the Bills of Rights of American constitutions. There is no realm of protection to the individual or to property interests which constitute the scope of civil liberty in America. This characteristic is referred to as the omnipotence of Canadian legislatures within their respective spheres.[11]

A second feature which distinguishes the Constitution of the Dominion from that of the United States is the possession by the federal government of the veto power over provincial legislation. By virtue of sections 56 and 90 of the Canadian Constitution a copy of every provincial act must be sent to the Governor-General, who may within two years after the receipt thereof disallow the Act. This device was intended as a check for the abuse of provincial authority and was regarded as a method of protecting the individual against unjust interference with vested rights.

Third among the salient features of the Canadian federal system

[10] Herbert Harley, 12 MICH. L. REV., 343.

[11] *Cf.* LEFROY, CANADA'S FEDERAL SYSTEM, 30–39.

is the provision that powers not specifically granted to the provinces are reserved to the Dominion. The provinces have no law-making powers except those expressly given them by the British North America Act. In Canada, therefore, the Dominion government not only has power to veto directly the legislative acts of the provinces but the federal government is also the residuary legatee of all powers not specifically granted to the provinces. On this matter a principle was adopted just the reverse of that incorporated in the fundamental law of the United States, wherein it was enacted that all powers not granted to the federal government were reserved to the states. Canada has thus avoided the necessity of expanding her federal authority by means of an implied power doctrine and the practice of progressive adaptation by the judiciary of general provisions which must be modified to meet new conditions. The courts of Canada have been saved from a heavy burden placed upon that department in the United States.

The residuary power whereby the federal government is authorized to make laws for the peace, order, and good government of Canada constitutes the fourth leading principle of the Dominion Constitution. By means of this principle, it was intended to remedy what was deemed "the capital defect of the American Constitution where the preservation of law and order is not summarily and directly the affair of the government of the United States." [12] The responsibility of maintaining public order throughout the entire country is thus placed directly upon the central government.

The combined effect of these principles, — no bill of rights with sphere reserved from governmental regulation; federal veto over provincial acts; provision that powers not specifically granted to the provinces are reserved to the Dominion; residuary authority in the federal government to make laws for the peace, order, and good government of Canada, — renders judicial control over legislation in Canada a different sort of control from that exercised in the United States. This difference is best appreciated by a review of acts invalidated in the courts of Canada and by a consideration of the limitations placed upon the judiciary in the exercise of this authority.

[12] *Ibid.* 94.

II. Judicial Review in Practice

A survey of the scope of judicial review of legislation in Canada requires a consideration of decisions of the Provincial and Dominion courts as well as the judgments of the Judicial Committee of the Privy Council. In the courts of any one of three jurisdictions, Provincial, Dominion, and Imperial, acts of Canadian legislatures may be impeached and may be declared *ultra vires* or unconstitutional.[13] Just as in the United States, courts refuse to enforce legislative acts, thereby rendering them null and void. This authority is not infrequently employed by provincial tribunals.

1. *Control by Provincial Courts.* The courts of the provinces, just as those of the states, not only decide as to the competence of provincial legislatures to enact certain measures but also place their stamp of disapproval on Dominion acts which are regarded as beyond federal jurisdiction. This power is exercised with a greater degree of caution than in the United States, but the question of competence is raised not infrequently and the legislative department must justify to the courts its course of action as being within the scope of legislative power.

Among the provincial acts held *ultra vires* by the lower courts are several which interfere with commerce and with specific Dominion powers, such as those relating to the authorization of an issue of debentures to a railway company,[14] the erection of piers and booms in a tidal river,[15] an attempt to grant an exclusive power to an elec-

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[13] There is a disposition on the part of some Canadian publicists to insist that the Canadian notion of an act held *ultra vires* is fundamentally different from the notion of an act held unconstitutional in the United States. For example, "It has been said by an American writer that in Canada the word 'unconstitutional' has a meaning corresponding to its use in the United States. This is an error. We use the word in the same sense and with the same connotation as in the Old Land. Careful speakers and writers use the phrase '*ultra vires*' for 'unconstitutional' in its American meaning; '*intra vires*' for 'constitutional.'" Justice Riddell, 32 Can. L. T. 353.

If there is any real difference it is not apparent in the decisions of Canadian courts or in the results that follow from such decisions. To one living under another dispensation, it seems that the use of the same term for an act beyond the powers granted to corporations, public and private, and a legislative act passed without authority, is confusing and is not as conducive to clear thinking on the subject as when two definite and specific terms, — "*ultra vires*" for acts of corporations and "unconstitutional" for legislative acts, — are in regular use by bench and bar.

[14] Queen *v.* Dow, 14 New Bruns. Rep. 300 (1873).

[15] Quiddy River Boom Co. *v.* Davidson, 25 New Bruns. Rep. 580 (1886).

tric lighting company,[16] and the Manitoba Shops Regulation Act.[17] Inasmuch as the regulation of insolvency is, by the British North America Act, granted to the Dominion Parliament, certain sections of local insolvent acts have been declared void.[18] A provincial act which authorized police magistrates to try and convict persons charged with forgery [19] and a statute imposing stamps upon law proceedings [20] were declared *ultra vires* as interfering with the Dominion power over criminal matters. Because of the Dominion and Imperial authority to control foreign affairs a provision which purported to prohibit the admission of Japanese as provincial voters [21] and an act intended to prohibit the employment of Chinamen in coal mines [22] were invalidated.

In accordance with the American theory of the separation of powers and in an opinion approving this theory and citing cases from American courts it was held that the appointment of the days on which the court should sit is a matter of procedure and of purely judicial cognizance, and is not within the power of the local legislature.[23] A subject on which many controversies have arisen and on which there has been much litigation is the matter of liquor legislation. Just as in the United States, it was originally thought that a kind of concurrent jurisdiction might be exercised on this subject. The courts have denied, however, to the local legislature the power to pass a law prohibiting the manufacture or sale of spirituous liquors.[24]

One of the most prolonged and most interesting controversies is that with reference to the power of the provincial legislature to tax the salaries of Dominion officials. In a very important decision the

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[16] Ottawa Electric Co. *v.* Hull Electric Co., 10 Queb. Sup. Ct. Rep. 34 (1899); *cf.* also 17 Queb. Sup. Ct. Rep. 420 (1908).

[17] Stark *v.* Schuster, 14 Man. Rep. 672 (1904).

[18] McLeod *v.* Wright, 17 New Bruns. Rep. 68 (1877); *In re* Assignments and Preferences Act, 20 Ont. App. Rep. 489 (1893).

[19] Regina *v.* Toland, 22 Ont. Rep. 505 (1892).

[20] Dulmage *v.* Douglas, 4 Man. Rep. 495 (1887).

[21] *Re* Provincial Elections Act, 8 Brit. Col. 76 (1901).

[22] *Re* Coal Mines Regulation Act, 10 Brit. Col. 408 (1904).

[23] The Thrasher Case, 1 Brit. Col. 153 (1882).

[24] Regina *v.* Justices of Kings, 15 New Bruns. Rep. 535 (1875); *cf.* also *In re* Local Option Act, 18 Ont. App. Rep. 572 (1891) and *In re* The Liquor Act, 13 Man. Rep. 239 (1901), wherein local legislatures were prohibited from permitting municipalities to pass by-laws in the nature of prohibition acts.

Supreme Court of Ontario, following the decision of Marshall in the case of *McCulloch* v. *Maryland*, approved the American doctrine of implied prohibitions and held that the local legislature could not levy such a tax because such taxation might interfere with the powers given to the federal authorities by the British North America Act.[25] This decision was followed and approved in the provinces of New Brunswick [26] and British Columbia.[27] On an appeal to the Privy Council of a similar decision from Australia,[28] the Council reversed the Australian Court and announced the decision that the doctrine of implied prohibitions as accepted and followed in the United States could not be held to apply to the public law of the self-governing colonies.[29] When the same issue was presented to the Supreme Court of Canada the justices followed the judgment and reasoning of the Privy Council and reversed the Leprohon and other provincial decisions.[30] Thus for Canada the doctrine of implied prohibitions has been definitely rejected at least so far as the federal government is concerned.[31]

Dominion acts may likewise be held *ultra vires* by provincial courts. Though seldom called upon to perform this function, there are sufficient instances to show that the lower courts do not decline when occasion arises to assert the right to refuse the enforcement of Dominion acts. In *Queen* v. *The Mayor of Fredericton* [32] and *Regina* v. *Bittle*,[33] sections of the Canada Temperance Act of 1878 were held invalid. A section of an act providing for the return of certain immigrants to the country whence they came was held void by the Ontario Court of Appeals [34] and provisions of an act of the Dominion for the reception in evidence of certified copies of documents and records in the Dominion land office were invalidated by

[25] Leprohon *v.* Ottawa, 2 Ont. App. Rep. 522 (1877).

[26] *Ex parte* Owen, 20 New Bruns. Rep. 487 (1881) and *Ex parte* Burke, 34 New Bruns. Rep. 200 (1896).

[27] Regina *v.* Bowell, 4 Brit. Col. 498 (1896).

[28] Deakin *v.* Webb, 1 Com. L. Rep. 585 (1904).

[29] Webb *v.* Outrim, [1907] A. C. 81.

[30] Abbott *v.* City of St. John, 40 Sup. Ct. Rep. 597 (1908).

[31] *Cf.* Deakin *v.* Webb, 1 Com. L. Rep. 585 (1904) and Commissioners of Taxation *v.* Baxter, 4 Com. L. Rep. 1087 (1907) for a discussion of the application of the doctrine of implied prohibitions in Australia. These and other Australian cases will be discussed in a subsequent article on judicial review of legislation in Australia.

[32] 19 New Bruns. Rep. 139 (1879).

[33] 21 Ont. Rep. 605 (1892).

[34] *Re* Gilhula, 10 Ont. L. Rep. 469 (1905).

the Manitoba Supreme Court.[35] Similarly a provincial court denied the authority of the Governor in Council to establish a ferry on the St. John River.[36]

2. *Control by Dominion Courts; (a) Over Provincial Acts.* The Supreme Court of Canada has defended the right of the federal government in its control over commerce by prohibiting the legislature of a province from granting exclusive rights of fishing as to the open sea within a marine league of the coast.[37] On similar grounds the provincial legislature was denied power to enact legislation authorizing the construction and operation of railways in such a manner as to interfere with the physical structure or with the operation of railways subject to the jurisdiction of the Parliament of Canada.[38] The authority to prohibit the sale of intoxicating liquors is also withheld from the provincial legislatures.[39] An attempt on the part of the Ontario legislature to prevent appeal to the Supreme Court of the Dominion in cases where the amount in controversy is under $1000 was declared *ultra vires*.[40] At other times the provincial legislatures were not allowed to permit the operation of lotteries [41] or to prohibit the performance of work on Sunday.[42]

(b) Over Dominion Acts. There are but few cases in which Dominion acts are held invalid. Among the statutes nullified by the Supreme Court are certain provisions in so far as they attempt to confer exclusive rights of fishing in provincial waters; [43] sections of the insurance act in so far as they purport to affect companies incorporated by one of the provinces and carrying on business exclusively in such province; [44] and the provisions of the section of an act assuming to authorize references by the Governor-General

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[35] McKilligan *v.* Machar, 3 Man. Rep. 418 (1886).

[36] *Ex parte* Dufour, 32 New Bruns. Rep. 357 (1893).

[37] Attorney-General of Brit. Col. *v.* Attorney-General of Canada, 15 Dom. L. Rep. 308 (1913).

[38] *In re* Legislation Respecting Railways, 48 Sup. Ct. Rep. 9 (1913).

[39] Severn *v.* The Queen, 2 Sup. Ct. Rep. 70 (1877). *Cf.* also *In re* Prohibitory Liquor Laws, 24 Sup. Ct. Rep. 170 (1894).

[40] Clarkson *v.* Ryan, 17 Sup. Ct. Rep. 251 (1890).

[41] L'Assn. St. Jean Baptiste de Montreal *v.* Brault, 30 Sup. Ct. Rep. 598 (1900).

[42] *In re* Legislation Respecting Labor on Sunday, 35 Sup. Ct. Rep. 581 (1905).

[43] *In re* Provincial Fisheries, 26 Sup. Ct. Rep. 444 (1895).

[44] *In re* Insurance Act, 15 Dom. L. Rep. 251 (1913).

in council to the judges of the Supreme Court for their opinions in respect to matters within provincial legislative jurisdiction.[45]

It is not only the power to say what shall not be law but also the authority to declare that legislative acts are within the competence of one or other jurisdiction which gives the courts their power over the legislative department. The many cases in which legislative power of one branch or other is approved are passed over and those are simply recorded in which through the judgment of a court the act or a portion thereof is rendered void and of no effect. Only a few of the acts thus invalidated can be given in the brief compass of a short article. Nor is it possible to follow the separate decisions here cited through their course in the higher courts in which some have been reversed, some modified in their effect and others approved substantially as decided in the lower jurisdiction. No attempt is made herein to present the nature and status of constitutional law in Canada; it is rather the purpose to show by concrete instances wherein the courts change or check the legislative will. The final jurisdiction in which the acts of Canadian legislatures may be invalidated is the Judicial Committee of the Privy Council.[46]

3. *Control by Judgments of the Privy Council.* The Privy Council is the tribunal to which questions of competence may ultimately be appealed. Cases may be carried directly from the province to the Judicial Committee or may be taken in rare cases from the decision of the highest court of Canada to the Privy Council. No matter how cases reach this court it is generally conceded that the authoritative exposition of the British North America Act rests with this Imperial tribunal.

[45] *In re* References, 43 Sup. Ct. Rep. 536 (1910).

[46] "A cause appealed to Ottawa cannot be appealed subsequently to London without the consent of the Privy Council, and this consent is given so seldom as to be practically negligible." Harley, 12 MICH. L. REV. 343; *cf.* "Our Court of Final Appeals," 48 CAN. L. J., in which it is observed: "As a matter of fact our Supreme Court is often skipped in the course of appeal. Decisions such as that rendered by the Judicial Committee of the Privy Council as to the implementing of the bond guarantee provision of the Dominion Government's agreement with the Grand Trunk Pacific Railway Company; such as that given the other day against the municipal corporation of Winnipeg and in favour of the Winnipeg Electric Railway Company; and such as that in favour of the Toronto Railway Company in the matter of rights upon our streets, have a strong influence to make our Legislatures study, as carefully as the British Parliament does so to draft their measures as to put the intention beyond controversy." (Pp. 205, 206.)

By this court the Quebec Act, which imposed a duty of ten cents upon every exhibit filed in court in any action pending therein, was held *ultra vires*.[47] The Ontario Act of 1892, in so far as it aimed to control the manner of fishing, was held *ultra vires* on the ground that fishing regulations and restrictions are within the exclusive competence of the Dominion.[48] Likewise the British Columbia Coal Mines Regulation Act, which prohibits Chinamen of full age from employment in underground coal workings, was in that respect declared *ultra vires;*[49] the provision of the British Columbia Cattle Protection Act, requiring that a Dominion railway company, unless they erect proper fences on their railway, shall be responsible for cattle injured or killed thereon, was also invalidated;[50] an act of Ontario to prevent the profanation of the Lord's Day was held void because an infraction of the act was made an offence against the criminal law, which was held to have been reserved for the exclusive authority of the Dominion Parliament; and it was considered *ultra vires* for the legislature of Ontario to tax property not within the Province.[51]

Not only does the Committee check the legislative vagaries of the provinces, but it also sits in judgment upon the interpretation placed upon the British North America Act by the Supreme Court of Canada. That the Committee is disposed to exercise a will of its own is shown in the reversal of the highest court of the Dominion relative to the right of the executive to require answers from the justices on questions both of law and fact. Despite provincial and Dominion decisions to the contrary the Council held it not *ultra vires* for the executive government of the Dominion to request answers from the Supreme Court.[52]

4. *Fundamental Principles Laid Down by Privy Council.* By far the most important function of the Privy Council as a court of final review lies in the formulation of general principles of interpretation for the Canadian government rather than in the reversal

[47] Attorney-General for Quebec *v.* Reed, 10 App. Cas. 141 (1884).

[48] Attorney-General for Dom. of Can. *v.* Attorney-General for Provinces of O., Q., and N. S., [1898] A. C. 700.

[49] Union Colliery Co. *v.* Bryden, [1899] A. C. 580.

[50] Madden *v.* Nelson & Fort Sheppard Ry., [1899] A. C. 626.

[51] Woodruff *v.* Attorney-General for Ontario, [1908] A. C. 508.

[52] Attorney-General for Ontario *v.* Attorney-General for Dom. of Can., [1912] A. C. 571; *cf.* LEFROY, CANADA'S FEDERAL SYSTEM, 672.

of Canadian courts or the annulment of legislative acts. Wielding the final power of review, subject of course to the Imperial Parliament, which practically never reverses its verdicts, the Council has steadily constructed a body of fundamental principles for the interpretation of the Canadian Constitution. First among these principles is the rule that laws relating to the peace, order, and good government of Canada must of necessity place certain restrictions and limitations upon property and civil rights. Even if a wide general power in the legislature might result in an interference with property rights or a denial of personal rights, the Council emphatically refuses to come to the rescue of such rights and privileges. The suggestion, says the court, "that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the courts of any limit upon the absolute power of legislation conferred. The supreme legislative power . . . is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the legislature is elected." [53]

A second principle enunciated by the Council is the emphatic denial that the provincial and Dominion legislatures are organs of delegated authority, and with this the rule is affirmed that there is no sphere of liberty between the two governments. The court holds that the provincial legislature derives no authority from the government of Canada, and its status is in no way analogous to that of a municipal institution. It possesses powers, not of administration merely but of legislation in the strictest sense of that word, and within the limits assigned by section 92 of the Act of 1867, its powers are exclusive and supreme.[54] The local legislature, the Parliament of the Dominion, and the Imperial Parliament are, from the general standpoint of legislative capacity, on the same plane. Their Lordships "adhere to the view which has always been taken by the Committee, that the Federation act exhausts the whole range of legislative power and that whatever is not thereby given to the provincial legislatures rests with the Parliament." [55]

The third and undoubtedly the most important principle of the court lies in the invariable practice of rendering short opinions and

[53] Attorney-General for Dom. of Can. *v.* Attorney-General for Provinces of O., Q., and N. S., [1898] A. C. 700, 713.

[54] Queen *v.* Burah, 3 App. Cas. 889, 903 (1878).

[55] Bank of Toronto *v.* Lambe, 12 App. Cas. 575, 588 (1887).

confining the discussion to the concise and exact point in issue. This practice is in marked contrast with the lengthy and involved opinions of the supreme courts in the United States. In many controversies each justice of an American court feels it incumbent upon him to render a separate opinion, whereas the Judicial Committee gives only the verdict with the opinion reduced to a minimum, and no dissent is allowed. In performing the difficult duty of interpreting the British North America Act, it will be a wise course, says the court, "for those on whom it is thrown to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand." [56] On another occasion their Lordships noted that they were impressed with the justice of an observation by Hagarty, C. J., "that in all these questions of *ultra vires* it is the wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy." [57] Their Lordships will not give speculative opinions on hypothetical questions submitted. The questions must arise in concrete cases and involve private rights.[58] Finally there is a disposition to avoid the determination of questions largely political in nature. The court dismissed one such question with the significant observation: "The needs of one country may differ from those of another, and Canada must judge of Canadian requirements." [59] Almost invariably the decisions of this tribunal as a final board of review on the controversial points of public law have received the hearty accord and approbation of the Canadian people.[60] It is fortunate indeed that the ultimate principles of constitutional law have been formulated by such an eminent group of men, who are entirely removed from the turmoil and recriminations of party politics.

[56] Citizens Ins. Co. *v.* Parsons, 7 App. Cas. 96, 109 (1881).

[57] Hodge *v.* The Queen, 9 App. Cas. 117, 128 (1883).

[58] Attorney-General for Ontario *v.* Hamilton Street Ry., [1903] A. C. 524.

[59] Attorney-General for Ontario *v.* Attorney-General for Dom. of Can., [1912] A. C. 571, 587.

[60] "Canada has given many recent evidences that she has no reason to regret the absence of absolute finality in the decisions of her own courts and has many times shewn that together with all other portions of the British Empire, her people look to the advisers of the Sovereign in Council in matters of the highest moment for a breadth of decision not surpassed by that of any other tribunal in the whole world." From speech of Hon. Wallace Nesbit, reported in 45 CAN. L. J. 105.

III. Limitations on Judicial Review

A summary of decisions reversing legislative acts indicates in a general way the character of the checks interposed by the judicial department on the legislative organs of the Dominion. These checks are similar in many respects to the corresponding restrictions enforced by the judiciary in the United States. In some noteworthy cases, principles which have become *fundamenta* of American law are cited, approved, and incorporated into Canadian public law. The insistence on all sides that the courts are the ultimate arbiters as to the scope of Dominion and provincial powers has a very familiar connotation to the constitutional lawyer of the United States. On the other hand the student of judicial control in Canada is at once struck by the fact that there are some marked limitations to the exercise of control over legislation by Canadian courts which do not restrict American justices in the exercise of similar authority.

The first among these limitations is the veto power, which the Imperial government may exercise over Dominion acts and which the Dominion government may exercise over provincial acts. While Canada is a self-governing colony and as a consequence is almost entirely free to manage her own affairs, nevertheless the Privy Council has repeatedly held that the paramount authority of the Imperial parliament has been in no wise lessened by the Canadian Constitution and that the Imperial government has regularly claimed the power to disallow any legislation which the self-governing colonies may enact.[61] In like manner the federal constitution gives the Governor-General full authority to disallow acts of the provincial legislatures, such disallowance being permitted only within two years after the passage of the act. The Imperial power of disallowance has been very rarely applied, except in regard to shipping regulations and the control over foreign affairs.[62] For the Dominion the device of a veto over provincial acts was evidently designed to avoid the bitter conflicts waged in

[61] *Cf.* Lefroy, Canada's Federal System, 50–58, for a discussion and citation of cases.

[62] For a list of subjects on which colonial acts have failed to receive the royal assent, consult 2 Keith, Responsible Government in the Dominions, 1020; among the special subjects noted are (*a*) copyright; (*b*) divorce and status; (*c*) immigration of colored races.

the United States over states' rights. The authors of the plan also conceived that this power could be used to prevent any unjust interference with private rights and property interests by means of provincial acts. In recent cases, however, the Dominion government has refused to interfere in favor of the protection of vested interests and the tenet has been announced that "an abuse of power even so as to amount to the practical confiscation of property, or that the exercise of the power has been unwise or indiscreet," is no valid ground for the use of the veto power.[63] As a result of these decisions it is confidently asserted that the veto power of the Dominion is slowly taking its place by that of the Crown and will soon disappear as a vital part of the Constitution.[64] The veto power, however, remains with the general government and may be called into service at any time to check attempts to injure seriously Imperial or Dominion interests. That the power of disallowance in the Dominion may be used effectively is shown in the refusal to sanction the recent attempt of British Columbia to prohibit Asiatic immigration. It may even yet be revived as a method to assure the protection of property interests and vested rights from the reckless onslaught of popular majorities in the provinces. In theory, therefore, the prerogative to disallow Canadian statutes and the corresponding authority to annul provincial statutes are, legally speaking, in full force and effect, and there can be little doubt that as potential rights the knowledge of these checks acts as a rather effective deterrent on extreme forms of legislative action.[65]

A second limitation on judicial control, and one of much greater

[63] See 45 CAN. L. J. 297 *et passim; cf.* also refusal to disallow the Ontario Hydro-Electric Power legislation. "The present interpretation of the section confines the power of disallowance to cases where there is a manifest encroachment by a Provincial legislature." 46 CAN. L. J. 357. The modern theory of disallowance was announced by the Governor-General in this case: "It is not intended by the British North America Act," he holds, "that the power of disallowance shall be exercised for the purpose of annulling provincial legislation, even, though your Excellency's Ministers consider the legislation unjust or oppressive, or in conflict with recognized legal principles, so long as such legislation is within the power of the provincial legislature to enact. The legislation in question, even though confiscation of property without compensation, and so an abuse of legislative power does not fall within any of the aforesaid enumeration."

[64] 48 CAN. L. J. 244.

[65] For discussion of the disallowance of provincial acts, see 2 KEITH, RESPONSIBLE GOVERNMENT IN THE DOMINIONS, 725.

significance, is the entire absence of restrictions on the power of the legislature relative to private property and civil rights. The familiar Bill of Rights of constitutions in the United States, with the consequent fetters upon legislative authority and judicial procedure, is a noteworthy omission in the Canadian constitutions. An evident desire to tie the hands of legislatures, which is a characteristic conspicuous in the public law of the United States, is practically unknown in the Dominion and the provinces. Canadians take pride in the fact that all power is divided between the two governments and commend the principle that leaves no gap and that shuts off no peculiar field of non-governmental control.

Certain features of American constitutional law, which have made this kind of law so vital and far-reaching in the United States, are not to be found in the constitutional system of Canada. In the latter nothing prevents the statutes of the provinces from impairing the obligation of contracts and from passing enactments depriving persons of life, liberty, or property without due process of law, or the equal protection of the laws. Such phrases as "liberty of contract," the limitation of the right of eminent domain, "unfair, unreasonable, and discriminating acts," which the courts have striven to define and whereby they have invalidated a considerable number of statutes in the United States, are referred to rarely and are of no practical consequence in the Dominion. If provisions relative to the impairment of the obligation of contract and to the denial of due process of law could be eliminated with all decisions arising therefrom, what would be the effect upon American Constitutional Law! It is easy to conclude that the results in our legal system would be very different from what prevails to-day.[66] These restrictions, along with others which are placed upon our federal government and the additional limitations on our states, combine to restrain the realm of legislative authority in the United States in a manner which was deliberately rejected by the framers of the British North America Act.[67]

[66] "One maxim only among those embodied in the Constitution of the United States would . . . have been sufficient if adopted in England to have arrested the most vigorous efforts of recent parliamentary legislation." DICEY, LAW OF THE CONSTITUTION, 5 ed., 165.

[67] In the words of Lefroy, "When one considers the strong position in which the judiciary are thus placed in America, reinforced by the constitutional provisions everywhere found, providing that no person shall be deprived of life, liberty or property

Canadians frequently call attention to the fact that there is an entire "absence of any attempt to fetter the freedom of our legislatures by fundamental limitations such as abound in the United States federal and state constitutions." [68] It is customary to speak of American legislatures as confined in straightjackets.[69] Referring to this point of difference between the two systems, the *Canada Law Journal*, speaking editorially regarding the New York Bakeshop Case, says:

"If this decision holds, and there is no appeal from it, except to the court itself in some other case, then the will of the people to provide better conditions for this class of work-people is practically frustrated for all time, or until some amendment can be made to the constitution. . . . Such a condition of things, however, could not arise in Canada, because the question for judicial decision would be which of two legislatures has the legislative power in the matter in question, and though the act of the Federal or a local legislature might be held *ultra vires*, that would not mean that there was no legislative control over the subject matter in question, but merely that the wrong legislature had assumed to deal with it, and it would still be competent to the proper legislature to legislate regarding it, without any constitutional amendment." [70]

Although there are a few *dicta* to the contrary, the general rule appears to prevail that courts may not pronounce acts invalid because they affect private rights injuriously.[71] A statement of the principle as generally applied by the courts is given in an opinion of the Minister of Justice relative to the Ontario Water Power Case, in which he asserted:

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without due process of law, and the vague generalities on which the American system permits courts to found decisions as to the validity of legislative enactments, such as 'fundamental principles of justice,' 'natural rights,' 'insuperable incidents to Republican government,' 'consistency with regulated liberty,' it is not surprising that Mr. Burgess should call the governmental system of the United States 'the aristocracy of the robe.'" 42 CAN. L. J. 449.

[68] 49 CAN. L. J. 656.

[69] 42 *Ibid.* 463.

[70] 47 *Ibid.* 10–11.

[71] *Cf.* L'Union St. Jacques *v.* Belisle, 20 L. Can. Jur. 29 (1874); Grand Junction Ry. Co. *v.* The Corporation of Peterborough, 8 Sup. Ct. Rep. 76 (1882); McGregor *v.* Esquimalt & N. Ry. Co., [1907] A. C. 462; Florence Mining Co. Case, 18 Ont. L. Rep. 275 (1908). For a defense of the view that the veto power of the Dominion government should be used for this purpose and for a discussion of precedents, see 45 CAN. L. J. 299 *et passim.*

"A suggestion of the abuse of power, even so as to amount to practical confiscation of property, or that the exercise of power has been unwise or indiscreet, should appeal to your Excellency's Government with no more effect than it does to the ordinary tribunals, and the remedy in such case is, in the words of Lord Herschell, an appeal to those by whom the legislature is elected." [72]

The insistence on this rule, it is asserted, demonstrates the marked difference "between the sovereign powers of Canadian legislatures, when legislating on subjects committed to their jurisdiction, and the limited powers of legislatures in the United States."

Laws interfering with the exercise of private rights are not infrequently passed, and in answer to the contention that the court should afford protection to the rights of the individual, the rule which prevails in England is affirmed, with the following comment:

"It is a thing unheard of, under British institutions, for a judicial tribunal to question the validity and binding force of any such law when duly enacted. While the law remains on the statute book the courts are absolutely bound to give effect to it." [73]

At another time it is affirmed, "that it does not belong to courts of justice to interpolate constitutional restrictions; their duty being to apply the law, not to make it." [74]

IV. Comparisons between Judicial Review in Canada and in the United States

What then is the position of the courts of Canada in relation to the legislative power? In theory both federal and local acts may be impeached in any judicial tribunal and are subject to construction, as to whether or not they are *ultra vires*.[75] Some Canadians insist that there is a vast difference between declaring acts *ultra vires*

[72] 44 Can. L. J. 557; also 45 Can. L. J. 297.

[73] Regina *v.* Kerr, 11 New Bruns. Rep. 553, 557 (1838).

[74] Severn *v.* The Queen, 2 Sup. Ct. Rep. 70, 103 (1878).

[75] *Cf.* 47 Can. L. J. 10–11. "An interpretation by the Parliament of Canada of the British North America Act is surely not binding on this, or on any court of justice. It is for the judicial power to decide whether the interpretation put on the Constitutional Act by either the Parliament of the Dominion or the legislatures of the Provinces is correct or not." From Taschereau in Valin *v.* Langlois, 3 Sup. Ct. Rep. 1, 73 (1879). This view is confirmed by the Privy Council in Citizens Ins. Co. *v.* Parsons, 7 App. Cas. 96, 108 (1881), wherein it is held to be the duty of the courts to define the limits of the respective powers of each legislature.

and declaring them unconstitutional. The difference, if there is any, is not readily discoverable. In fact, the principles upon which judicial power is based, the practice in the application of the power and the great deference to judicial opinion, — all of which have had such a high development in the United States, — are equally characteristic of Canadian constitutional law.

Thus the foundation principle of Canadian public law is similar to that of the United States, viz., that the courts are called upon to determine the competence of legislative bodies, both Dominion and provincial. It devolves upon a court of justice ultimately to determine whether either government has exceeded the limits of its jurisdiction. There is some dispute as to whether the Privy Council, to which body many such disputes ultimately go, is a judicial or a legislative body. Nevertheless the decisions on controversies in the realm of public law are determined in a regular judicial manner, with the full force and effect of decisions by supreme or superior courts and in ordinary practice are not reversible. At any rate when the Dominion Parliament or the provincial assemblies attempt to go beyond their spheres of action the Supreme Court, and ultimately the Privy Council, may be called upon to decide whether such action is *ultra vires* or not.[76] Just as under the federal system of the United States, the courts are constantly called upon "to define gradually and with greater exactness as time progresses the relative powers given by the Act to the Dominion and provinces respectively. . . ." [77]

The practice of Canadian courts is thus described by one of the provincial tribunals:

"We have passed from the time when the powers of the local legislature were under an unwritten constitution, and were in all respects supreme unless Imperial enactments were encroached upon. We are now under a written constitution, where alike the Dominion Parliament

[76] 48 CAN. L. J. 243. "While, as has been pointed out above, a British judge could not listen to an argument that a statute of the Imperial Parliament is invalid because it goes beyond the limits of parliamentary authority, the position of a judge in respect of a Canadian Statute, Dominion or provincial, is quite different. 'In Canada, as in the United States, the courts inevitably become the interpreters of the Constitution.' Dicey, 164. The powers of the legislatures being confined to certain specified subjects, the courts must necessarily determine in each particular case whether the subject of the legislation is within the specified classes." From Smith *v.* City of London, 20 Ont. L. Rep. 133, 138 (1909).

[77] Regina *v.* Wing Chong, 1 Brit. Col., pt. 2, 156 (1885).

and the Local Legislatures, alike the Executive and Judiciary, are by that written constitution circumscribed, although supreme within the limits so set forth. It, therefore, follows that Parliament and the Local Legislatures must so adjust their enactments as to meet the requirements of the Constitutional Act. From time to time, by reason of the conflict of laws passed by parliament with those passed by the Local Legislatures, constitutional questions, not only novel but embarrassing, will arise, and these can only be decided by the judicial tribunals.[78]

"When the subject matter of legislative acts is brought before the courts they have to pronounce upon the validity of the enactment. And this they have to do as well in regard to Provincial as Federal legislation; and the Courts have to see and ascertain whether or not the acts are within the powers respectively assigned to Parliament or the Local Legislatures." [79]

The frequent expressions that Canadians have reason to feel satisfied that in Canada they have followed British rather than American precedent in forming their constitutional system,[80] contain an element of truth; nevertheless this *dictum* by no means gives due weight to the influence of the public law and practice of the United States. For, in the words of Professor Dicey, "The essential characteristics of federalism, — the supremacy of the constitution, the distribution of powers, — the authority of the judiciary, — reappear, though no doubt with modifications, in every true federal state. . . . In Canada, as in the United States, the courts inevitably become the interpreters of the constitution." [81] And in the interpretation of the Constitution, Canadian justices could not, if they would, ignore the remarkable system of consti-

[78] Queen *v.* Mayor of Fredericton, 19 New Bruns. Rep. 139, 180 (1879).

[79] LAW OF THE CONSTITUTION, 180. The plan of control over Dominion Acts may be illustrated by the following outline:

A. Legislative control.
   1. Provincial Legislature.
   2. Gov. Gen. — Power of Disallowance.
   3. King in Council.
   4. Imperial Parliament.

B. Judicial Control.
   1. Courts of Province.
   2. Supreme Court of Canada.
   3. Privy Council (England).
   4. House of Lords (Supreme Court of Appeal).
   5. Imperial Parliament.

[80] *Cf.* 47 CAN. L. J. 10, and LEFROY, LEGISLATIVE POWER IN CANADA, Introduction.

[81] 1 LAW QUART. REV. 93.

tutional law and interpretation which has grown up in the United States.

There are many evidences indeed that Canadian judges and jurists have been willing to learn from the United States and to follow the precedents established by our courts although they have not hesitated to criticise and reject such conclusions or principles as have appeared inapplicable to their federal institutions. The debt which Canada owes to the United States is eloquently expressed in some notable opinions of provincial and Dominion justices. In the words of Justice Spragge:

"It is to the Marshalls and Storys of the neighboring Republic, and to their successors in that Court, which is still true to the traditions of the best age of American jurisprudence, that we have to look for guidance and assistance on a subject most familiar to them, — most unfamiliar to us." [82]

Similarly, referring to the principles announced by the Supreme Court of the United States, Justice Duff maintains:

"They are the result of a careful application of established canons of construction to a Federal Constitution, in many particulars not unlike our own, by men, some of whose names as constitutional lawyers are unsurpassed in the annals of modern jurisprudence. And they embody a system of constitutional law upon that subject, such as cannot be found elsewhere." [83]

On another occasion the court observed:

"In cases like this, where we have no, or scarcely any, English decisions to guide us, for such federations do not exist there, the authorities of the United States, where very similar political bodies exist, though not binding on us, are entitled to the greatest attention and respect, as the production of some of the greatest jurists the world has seen." [84]

That the Privy Council has not been disposed to encourage this tendency to follow American citations is clearly shown in the important opinion rendered in *Bank of Toronto* v. *Lambe.* Says the court:

"Their Lordships have been invited to take a very wide range on this part of the case, and to apply to the construction of the Federation Act

[82] Leprohon *v.* Ottawa, 2 Ont. App. Rep. 522, 533 (1878); also *Ex parte* Owen, 20 New Bruns. Rep. 487 (1881).

[83] *Ex parte* Owen, 20 New Bruns. Rep. 487, 497 (1881).

[84] The Thrasher Case, 1 Brit. Col. 153, 216 (1882).

the principles laid down for the United States by Chief Justice Marshall. Every one would gladly accept the guidance of that great judge in a parallel case. But he was dealing with the constitution of the United States. . . . It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federated provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself, except under the control of the whole, acting through the Governor-General. And the question they have to answer is whether the one body or the other has power to make a given law." [85]

And the Supreme Court of Canada has also evinced a clear intention not to permit the decisions of American courts to have too great weight in the Dominion. This intention is shown in the reversal of the provincial decisions establishing the rule of implied prohibitions for the purposes of taxation,[86] and also in the evident desire in recent years to avoid citations to court decisions in the United States. It is no doubt the desire of justices both Imperial and Dominion to build up a constitutional system based on principles which are more closely modelled after modern English law than that of the United States.

Moreover, judicial review in practice is a very different thing in Canada from what it is in the United States. There is no encouragement or incentive to place confines on the legislative realm, for Canadians have not accepted the *dictum* which has had such a vogue in the United States, that it is the chief object of a constitution to confine and restrain the legislative power.[87] The courts in Canada are disposed to grant a free rein to legislative vagaries as long as each branch keeps within the limits carefully defined by the Constitution. Justices as well as political leaders have been prone to uphold the theory that each legislature is supreme within its special domain. So far as it is possible to judge by the number and importance of acts invalidated, judicial control has decreased as the constitutional relations have become more carefully defined. This decline in constitutional cases has been so marked that there

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[85] 12 App. Cas. 575, 587 (1887).

[86] Abbott *v.* City of St. John, 40 Sup. Ct. Rep. 597 (1908).

[87] *Cf.* Sill *v.* Corning, 15 N. Y. 297, 303 (1857).

is only a slight interest in constitutional law among Canadian lawyers and judges.[88] This decline is in marked contrast with the development which has given the courts more and more power in the United States and has made constitutional law one of the greatest of our branches of jurisprudence.

One fact which has no doubt aided greatly in clarifying and solidifying the relations between the Dominion and the provinces of Canada, and which accounts in large part for the decline in judicial decisions delimiting legislative power, is the regulative function of the Privy Council. This body is entirely removed from the turmoil of Dominion politics and, from a vantage ground of lofty independence and superiority, it has firmly and effectively laid down the principles which have become the chief tenets of Canadian public law. The difficulty of a coördinate branch of government venturing to assert its authority over another department, which has on various occasions caused bitter feeling in the United States, has thus been averted by referring doubtful questions involving points of delicate political adjustment to this separate and independent judicial tribunal. It is a marked tribute to the wisdom and justice of the decisions of the Council that its decrees have been almost invariably accepted and approved by the public opinion of Canada.

Canadian courts apply no broad guarantees of individual rights. They rarely find it necessary to invalidate acts, and there is always a disposition to permit the legislative act to stand if any justification for jurisdiction over the subject matter appears. Moreover the final court of appeal is the Judicial Committee, which in theory at least is a branch of the legislative department of the English government. The verdicts of this court are subject to the general authority of the Imperial Parliament in its legislative capacity. But Parliament very rarely modifies or reverses its verdicts, so that in fact practically all cases of judicial construction of legislative acts are determined by courts in the regular process of judicial decision. The possibility, however, that the decisions of the Judicial Committee may be reversed in Parliament, that this body has a semi-legislative status and the fact that the legislative acts of federal and provincial parliaments are rather infrequently sub-

[88] "Constitutional questions are, in comparison with their frequency in the United States, rarely raised in ordinary litigation." Quoted 46 CAN. L. J. 358.

ject to invalidation as *ultra vires*, add color to the *dictum* which Canadians are prone to emphasize to the effect that their legislatures are supreme.

The combined effect of all limitations and restrictions placed about the exercise of this authority renders judicial review in Canada a relatively simple matter of construction. And as the Judicial Committee and high court have developed the principles of interpretation for the Canadian Constitution, cases for the reversal of the legislative will have declined both in the federal and state governments. Cases raising vital issues of construction have arisen quite infrequently in recent years, and if one may venture a prophecy seem likely to grow less and less as time goes on. With the specific powers of both governments carefully outlined in the fundamental law, all powers distributed between the two governments, and with no incentive to the judiciary to exercise a censorship over legislative acts on vague general principles which rest for application with the judicial conscience, it cannot be claimed that judicial review in Canada has anything like the potency that it has in the United States.

On the other hand, the disposition to deny the influence of judicial decisions and the customs prevailing in the federal system of the United States is scarcely in accord with the facts, and evinces something of a spirit of prejudice which may be natural on the part of the public men in a nation with whom our relations in the past have been none too friendly. Indeed the statesmen who framed the British North America Act, who sought to avoid the defects which time and events had shown to exist in the Constitution of the United States [89] and who aimed to preserve their allegiance and loyalty to their motherland, adopted a form of government which has been declared to be "a happy compound of the best features of the British and American constitutions." [90] Among the features of this compound, in which the influence of the United States is particularly evident, is the practice of judicial review of legislation, — now a well recognized and highly approved feature of the Canadian Federation.

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[89] See opinion of Sir John Macdonald, quoted in *In re* Prohibitory Liquor Laws, 24 Sup. Ct. Rep. 170, 206 (1894).

[90] From opinion of George Brown, quoted in *In re* Prohibitory Liquor Laws, 24 Sup. Ct. Rep. 170, 207 (1894).